Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1051

ROBERT CRABBE and KENNETH CAMPBELL,
Petitioners,

vs.

GLEN D. HORD,
Respondent.

MOTION TO [redacted] DENY PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1976

NO. 76-1051

ROBERT CRABBE and KENNETH CAMPBELL,
Petitioners,

vs.

GLEN D. HORD,
Respondent.

MOTION TO DISMISS OR DENY PETITION FOR WRIT OF CERTIORARI

Respondent moves to dismiss or deny the petition for a writ of certiorari, pursuant to Rule 16 (1) (b) and (c) of the Rules of this Court.

JURISDICTION

The Supreme Court should not accept jurisdiction of this appeal or application for writ of certiorari under 28 U. S. C. § 1257 (2) and § 1257 (3) because no federal question or constitutional due process ground was seasonably raised, presented, argued, decided or preserved in any state court proceeding with the possible exception of a last-minute motion for rehearing before the Supreme Court of Texas, and this only with regard to the point concerning Justice Spurlock. *American Surety Co. v. Baldwin,* 287 U. S. 156, 77 L. Ed. 231 (1938), opinion by Mr. Justice Brandeis. Respondent accordingly moves to dismiss or deny the application.

STATEMENT

This case involves an appeal from a default judgment wherein Petitioners Crabbe and Campbell were personally served with process. Respondent sustained serious and permanent personal injuries as a result of being struck from the rear while stopped in his automobile at a red light by a truck being driven by Crabbe and owned by Campbell, and thereafter, Crabbe and Campbell having failed to appear and answer, Respondent obtained a joint and several default judgment against them. Respondent's damages were set by the trial judge in the original proceedings after evidence was heard. In the ensuing trial wherein Petitioners attempted to obtain relief from the default judgment, the jury refused to find that either

Crabbe or Campbell were prevented from presenting their defenses in the original lawsuit because of any mistake, fraud or wrongful act of Respondent or his attorney. Crabbe and Campbell did not even request any jury issues inquiring as to their lack of fault or negligence in connection with their failure to appear and answer as required by law after having been personally served with process in the original case. Further, and contrary to the Texas law, they did not request a jury issue inquiring as to whether the granting of a new trial would occasion no delay or otherwise work an injury to Respondent, and they failed to verify their pleadings.

OPINION BELOW

The opinion of the Court of Civil Appeals of Texas is attached as Appendix A to Petitioners' Application for Writ of Certiorari.

ARGUMENT

The facts in this case, as disclosed by the entire record and the opinion of the Court of Civil Appeals of Texas, reveal the following:

1. Petitioners admit in their motion for recusal of Judge Spurlock "there exists no constitutional or statutory disqualification in this case," and "these facts were not

used as a basis for a point of error in the application for writ of error quite frankly because they apparently do not in themselves amount to reversible error." They further admit that "appellants have the utmost regard for the integrity and objectivity of Justice Spurlock." However, Judge Spurlock voluntarily recused himself, and did not participate in what was, necessarily, a 2-0 decision. There is no basis, either in the record or in fact, that Judge Spurlock "was a former law partner of Hord's attorney."

2. Under Texas law, Petitioners unquestionably failed to establish the necessary requirements to set aside the default judgment against them. The Supreme Court of Texas in *Alexander v. Hagedorn,* 148 Tex. 565, 226 S. W. 2d 996 (1950) and *Gracey v. West,* Tex. Sup. Ct., 422 S. W. 2d 913 (1968), sets out the three requirements:

(1) A meritorious defense to the cause of action alleged to support the judgment.

(2) Which the petitioner was prevented from making by the fraud, accident or wrongful act of the opposing party.

(3) Unmixed with any fault or negligence of petitioner.

Petitioners alleged and proved that they were properly served with personal service of citation in the original case. In the trial attempting to set aside the default judgment, the jury refused to find that either Respondent or his attorney were guilty of any fraud or wrongful act in connection with the original default judgment, and also failed to find that any conduct on the part of Respondent or his attorney in any way prevented Crabbe and Campbell from entering their appearance in the original law-

suit and presenting whatever defense they might have had. Crabbe and Campbell also failed in offering any evidence and obtaining any jury finding that they were not guilty of any fault or neglect in connection with their failure to appear in the original case as required by law. All of the evidence in the entire record shows as a matter of law that both Crabbe and Campbell and their representatives were negligent in connection with their failure to file answers. A. M. Pittman, an employee and agent of Melton Truck Lines, who is not a licensed attorney contrary to his prior representations to such effect to Hord's counsel, testified that he intended to handle the defense of the original case for both Crabbe and Campbell, and that he hired Lancaster Smith, a Dallas attorney, "to defend this case." Pittman testified he directed Lancaster Smith to file answers for Melton and Crabbe, but an answer was filed only for Melton. Crabbe and Campbell were relying on Pittman to take care of the matters of defense by turning over their citations to him. Based on what amounted to only oral instructions, A. M. Pittman and Lancaster Smith failed to file answers for Crabbe and Campbell. There is no evidence in the record that Hord, his attorney, any clerk or deputy, or any judge had anything to do either directly or indirectly with the failure of Crabbe and Campbell's attorneys to file answers. In *Brownson v. Reynolds,* 77 Tex. 254, 13 S. W. 986 (1890) the Supreme Court of Texas declared: "It is a rigid rule that courts of equity will not grant a party to a judgment a new trial when the failure to have a full and fair presentation of his case has resulted from the negligence or mistakes of his counsel." This rule of law was followed in *Swearingen v. Swearingen,* Tex. Civ. App., 487 S. W. 2d 784 (1972), which

was a suit for a bill of review holding that the failure of the parties' counsel to file an answer because he forgot to do so is imputed to the client and prohibits him from obtaining any relief.

3. The failure of the clerk to comply with Rule 239a regarding the sending of notice of the judgment is inconsequential. Per the express terms of the Rule, the finality of the judgment is not affected by the clerk's failure to send notice. *Petro-Chemical Transport, Inc. v. Carroll,* Tex. Sup. Ct., 514 S. W. 2d 240 (1974), contains an exhaustive discussion on the effect of the clerk's failure to comply with a similar rule which requires the clerk to send notice of a judgment or appealable order to a party (such rule in its intent being analogous to that of Rule 239a), the thrust of which is that if the requirements for a bill of review are not first met then the failure of the clerk to send notice would not waive any of those requirements. In the case before this Court, Crabbe and Campbell failed to establish two of the three elements which the Supreme Court of Texas has said were essential for a defendant who has suffered a default judgment after proper personal service of citation.

Further, in connection with this point, Respondent has been unable to find any place in the record where Petitioners have even attempted to raise these matters as constitutional or due process questions for review by this Court. It is respectfully submitted that neither of the two "questions presented" by Petitioners have been heretofore seasonably raised, discussed, presented, or ruled on by any state court.

4. As a matter of law, on the following grounds, each of which are unquestionably established from the record in this case, any of which would defeat Petitioners' claim for relief, all of the lower courts have entered the only legal and equitable judgment possible herein:

(a) The jury refused to find that either Crabbe or Campbell were prevented from presenting their defenses in the original lawsuit because of any mistake, fraud or wrongful conduct of Respondent or his lawyer, as required by *Alexander v. Hagedorn,* supra.

(b) Crabbe and Campbell did not even request any issue inquiring as to their lack of fault or negligence in connection wiht their failure to appear and answer, also as required by *Alexander v. Hagedorn,* supra.

(c) Crabbe and Campbell did not even request any issue inquiring as to whether a new trial would occasion no delay or work any injury to Respondent, as required by *United Beef Producers, Inc., v. Lookingbill,* 532 S. W. 2d 958 (Tex. 1976).

(d) Crabbe and Campbell failed to verify their petition for bill of review as required by *McCann v. Ward County,* 423 S. W. 2d 339 (Tex. Civ. App., 1968), and *In Re: H. D., Jr.,* 511 S. W. 2d 615 (Tex. Civ. App. 1974).

5. It is submitted that cases such as *Armstrong v. Manzo,* 380 U. S. 545 (1965) as cited by Petitioners are involved with situations where the defendant was not personally served with citation and was thereby deprived of notice and hearing. Of course, such is not the case here, as Petitioners had every r i g h t and opportunity to be heard, but simply defaulted through their own carelessness and neglect together with that of their counsel. They have

had notice and a full and fair hearing by four impartial tribunals throughout these proceedings, but have simply failed to prevail in each and every instance.

6. Without belaboring other examples, only one illustration will be here given to show the exaggerations, distortions, inaccuracies and untruths contained in Petitioners' application: on page 15 thereof, of the five points, each is either untrue or a conclusion.

7. Finally, if a writ is granted and a reversal ensues, the door will be opened to a flood of state court default judgment cases. There is absolute necessity that finality be accorded to judgments, and particularly where no federal question or constitutional grounds are seasonably raised.

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CONCLUSION

For the foregoing reasons, the Court should dismiss or deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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By: /s/ R. G. Guthrie

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